IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 10.7.2006

Coram:

The Hon'ble Mr.JUSTICE S.RAJESWARAN

C.R.P.(NPD) No.644 of 2003

K.Vijayan .. Petitioner(3rd Respondent)

vs.

1.K.G.Kuppusamy
2.R.V.Mohanasundaram
3.G.Thanigachalam
4.Sambasivam .. Respondents(Petitioner and Respondents 1,2 and 4))

Revision Petition filed u/s CPc 115 against the order dated 10.3.2003, passed in E.P.No.29/2001 in O.S.No.342/1999, on the file of the Sub Judge, Gudiyatham, Vellore District.

For Petitioner : Mr.T.Karunakaran
For 1st Respondent : Mr.N.Venkatesh Vivekanandan, For Mr.G.R.Swaminathan.

ORDER:

This revision petition has been filed against the order dated 10.3.2003 passed by the Sub-Judge, Gudiyatham, Vellore District in E.P.No.29/2001 in O.S.No.342/1999.

2. The 3rd respondent in E.P.No.29/2001 is the revision petitioner before this court. The 1st respondent herein is the plaintiff in O.S.No.342/1999 on the file of the Sub Judge, Gudiyatham for recovery of money. The suit was decreed on 4.2.2000 and the decree holder filed E.P.No.29/2001 praying to issue notice to the defendants in the suit under Order 21 Rule 37 of C.P.C. to realise the decree amount and in case of default to issue arrest warrant under Order 21 Rule 38 of C.P.C. and to commit them to civil prison to realise the decree amount. An affidavit was filed by the decree holder in E.P.No.29/2001 in support of the Execution Petition. It is stated by him that in I.A.No.533/1997 an order of Attachment Before Judgment was obtained by him and in spite of that the property was sold by the revision petitioner who is working as Manager in Petrol Bunk at Gudiyatham, earning a sum of Rs.6,000/- per month.

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3.A counter affidavit was filed by the revision petitioner in E.P.No.29/2001 stating that he is only a cooly and has no means to pay the debt. The execution court by order dated 10.3.2003 allowed E.P.No.29/2001 ordering arrest of the revision petitioner and to produce him before the court on or before 11.4.2003. Aggrieved by the order of arrest dated 10.3.2003, the above revision petition has been filed.

4.Heard the learned counsel for the revision petitioner and the learned counsel for the respondents.

5.After going through the records and hearing the arguments of the learned counsel for the petitioner, I am of the opinion that the execution court has not followed the correct procedure contemplated under Order 21 Rule 40(1) of C.P.C. before ordering arrest of the revision petitioner.

6. For better appreciation, Order 21, Rule 40(1) of C.P.C. is extracted below:-

> "40. Proceedings on appearance of judgment-debtor in obedience to notice or after arrest:- (1) When a judgment-debtor appears before the Court in obedience to a notice issued under Rule 37, or is brought before the court after being arrested in execution of a decree for the payment of money the Court shall proceed to hear the decree-holder and take all such evidence as may be produced by him in support of his application for execution and shall then give the judgment-debtor an opportunity of showing cause why he should not be committed to the civil prison."

This provision shows that the decree holder should produce evidence as to the means of judgment debtor and thereafter it would be essential for the court to give the judgment- debtor an opportunity of showing cause as to why he should not be committed to civil prison.

7. Sec.51 (c) of C.P.C. also deals with the powers of the execution court to enforce the execution by arrest/detention in prison. The proviso contained in Sec.51 of C.P.C. states that where the decree is for payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment debtor an opportunity of showing cause why he should not be committed to prison. The court also should satisfy itself that the judgment debtor with the object or effect of obstructing or delaying the

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execution of the decree is likely to abscond or dishonestly transferred any of his properties pending suit or committed any other act of bad faith in relation to his properties. The court should also satisfy itself that the judgment debtor has a means to pay the amount of the decree and he refuses or neglects to pay the same. Only subject to all the conditions contained in Sec.51 and Order 21, Rule 40(1) of C.P.C., the judgment debtor can be committed to civil prison.

9.But in this case no enquiry has been conducted by the trial court about the sale of the property of the judgment debtor even though the same was Attached Before Judgment and decreed in I.A.No.533/97, as specifically stated by the decree holder in his affidavit. Even with regard to the capacity or means of the judgment debtor is concerned, the executing court has only drawn adverse inference as the judgment debtor did not enter the witness box to deny the averment of the decree holder. It is also not shown whether any opportunity was given to the judgment debtor to show cause as to why he should not be committed to civil prison as contemplated under Order 21 Rule 40(1) of C.P.C.

9. Therefore, the mandatory provisions contained in C.P.C. are not complied with by the execution court. It is just and necessary to set aside the order of execution court dated 10.3.2003 and the same has to be remanded to the execution court for deciding the Execution Petition No.29/2001 afresh by following the mandatory provisions enumerated under Order 21 Rule 40(1) of C.P.C. and Sec.51 of C.P.C. The execution court is specifically directed to conduct a detailed enquiry of the sale of the properties of the revision petitioner herein, whether there was any order of Attachment Before Judgment in I.A.No.533/97 and to give a second opportunity of showing cause as to why the revision petitioner should not be committed to civil prison if the execution court comes to a conclusion on the basis of evidence that the revision petitioner has means to satisfy the decree and he has also transferred the property when O.S.No.342/99 was pending on the file of the Sub-Judge, Gudiyatham.

11.Thus the Civil Revision Petition is allowed and the matter is remanded to execution court for fresh disposal in the light of the above direction. No costs. C.M.P.No.6802/2003 is closed.

sks

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

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To

1. The Subordinate Judge,
Gudiyatham, Vellore District.

2. The Record Keeper,
VR Section,
High Court, Madras.

+ 1 cc to Mr. K.S. V. Sethuraman, Advocate SR No.29557

+ 1 cc to Mr. G.R. Swaminathan, Advocate SR No. 29965

JRG(CO)
SR/24.7.2006

Pre-delivery order,
C.R.P.(NPD)644/03.

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